FILED
JAN 18 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 545

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, A CORPORATION,

Appellant,

vs.

CLARENCE OWEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 545

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, A CORPORATION,

Appellant,

vs.

CLARENCE OWEN,

Appellee

JURISDICTIONAL STATEMENT FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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(1) Statutory Authority

This case is a proper one for appeal from the Supreme Court of the State of Kansas to the Supreme Court of the United States under Section 1257(2) of the Federal Judicial Code (62 Stat., 929; 28 U. S. C., Sec. 1257(2)) for the reason that there is drawn into question the validity of a statute of the State of Kansas, to-wit: General Statutes of 1935, Sec. 40-1109(a) (6) and (i); and the decision of the Supreme Court of the State of Kansas herein is in favor of the validity of the State statute.

The material parts of the text of the State statute are as follows:

> Section 40-1109. * * *
>
> (a) No stock or mutual insurance company or association * * * shall issue or deliver any policy of insurance against loss or damage for the sickness * * * of the insured * * * (6) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply * * *;
>
> (i) A policy issued in violation of this section shall be held valid but shall be construed as provided in this section, and when any provision in such a policy is in conflict with any provision of this section the rights, duties and obligations of the insurer, the policyholder and the beneficiary shall be governed by the provisions of this section.

In our Assignments of Error other federal questions are raised which do not involve a direct challenge to the above-cited state statute, but since this is a proper appeal case as distinguished from a case for *certiorari*, these additional points may be properly assigned here as error. *Flournoy v. Wiener*, 316 U. S. 253, l.c. 263.

(2) Proceedings in the Kansas Courts

This case involved two separate judgments of the District Court of Lincoln County, Kansas, in cases between the same parties. Separate appeals were filed from each judgment to the Supreme Court of the State of Kansas, but the two cases were heard together and disposed of in a single opinion by that Court. They are, therefore, properly presented in a single appeal. *First National Bank of Shreveport v. Louisiana Tax Commission*, 289 U. S. 60.

The cases in question were suits for confining illness benefits (for successive periods) under a policy of health and accident insurance, photostatic copy of which is attached

hereto for convenient reference. That part of the policy which is directly in question is as follows:

Illness Indemnities

Confining Illness Eighty Dollars per Month

Part II.

The Association will pay, for one day or more, at the rate of Eighty ($80.00) Dollars per month, not exceeding twelve months, for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

By the language of the policy such benefits are thus expressly payable only for a one-year period, but the plaintiff-appellee contended that that part of the policy which specified the one-year period was an "exception" to the insuring clause and in violation of the Kansas statute above cited. The Supreme Court of the State of Kansas agreed with his contention in opinions reported 166 Kan. 525, 203 P. 2d 196, 168 Kan. 10, 210 P. 2d 232, and 171 Kan. 457, — P. 2d —.

Case No. 38365 was filed to recover confining illness benefits under the policy from June 8, 1940, to June 22, 1946. A general demurrer was filed to plaintiff's petition and overruled by the trial court. Appeal was taken to the Supreme Court of Kansas, such order being appealable under the laws of Kansas, and the judgment of the District Court of Lincoln County was then and there affirmed (opinion Appendix "A" hereto, 166 Kan. 525, 203 P. 2d 196). Motion for rehearing was granted, but on rehearing the prior opinion was adhered to (opinion Appendix "B" hereto, 168 Kan. 10, 210 P. 2d 232). This appellant then filed its answer

to the plaintiff's petition in the District Court of Lincoln County, Kansas, raising the federal questions set forth in Assignments of Error (1), (2) and (3), Appendix "D" hereto, in paragraphs 5, 6 and 8 of its Answer. Thereupon the case was tried in the District Court to the court without a jury, and judgment was rendered for the plaintiff-appellee and against this appellant.

Case No. 38366 was also filed in the District Court of Lincoln County, Kansas, to recover benefits under the same policy from June 22, 1946, to January 8, 1950. The first pleading filed by this appellant therein was its answer, which raised the federal constitutional points covered by Assignments of Error (1), (2) and (3) in paragraphs 8 and 9 of said answer. On trial, judgment was rendered in favor of the plaintiff-appellee and against this appellant. There was no interlocutory appeal to the Supreme Court of Kansas as in the prior case, but there was an appeal in due course after final judgment in the District Court.

The two cases were heard together by the Supreme Court of the State of Kansas and a single opinion was rendered affirming the judgment of the lower court in each case. The opinion (Appendix "C" hereto) was handed down *July 3, 1951*, and a timely motion for rehearing was filed on behalf of this appellant on July 20, 1951, which motion was denied by the court on *October 12, 1951*. Under Sec. 2101 (c) of the Judicial Code, application for this appeal may be made within ninety days from the latter date. Appeal was allowed by Mr. Justice Clark, December 28, 1951.

Assignment of Error (4) (Appendix "D" hereto) relates to the holding of the Supreme Court of the State of Kansas that the constitutional questions presented in case No. 38365 were raised at too late a stage in the proceedings to permit their consideration, and should have been raised

in the demurrer or in the motion for rehearing on the first appeal. This holding was challenged in appellant's unsuccessful motion for rehearing following the last opinion. Inasmuch as it relates to the refusal to hear a claim of federal right, the action of the state court, if improper, constitutes in itself ground for further relief in the Supreme Court of the United States. *Honeyman* v. *Hayman*, 300 U. S. 14; *Patterson* v. *Alabama*, 294 U. S. 600.

Assignment of Error (5) (Appendix "D" hereto) herein relates to the holding of the Supreme Court of the State of Kansas that the federal constitutional points were not open for decision in case No. 38366 for the reason that they were not raised in a timely manner in case No. 38365. This holding was raised by the Supreme Court of the State of Kansas on its own motion, on a point neither briefed nor argued by the appellee. This appellant first attacked this holding on its motion for rehearing in the Kansas court, which was the earliest stage at which it could have been raised under the circumstances. See *Missouri ex rel Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673.

Assignments (6) and (7) relate to the judgment, which of course is erroneous if the other assignments of error are well-founded.

(3) The Federal Questions Raised Are Substantial

(a) *Assignment of Error No. (1).*

Our contention under this Assignment is that the statute cited above as construed by the Supreme Court of Kansas in its opinions herein is so indefinite and uncertain that it fails to advise insurance companies in the position of this defendant of the steps which they must take in

order to comply with the statute, or what constitutes a violation of the statute.

We rely on such cases as *U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210; and *Lanzetta* v. *New Jersey*, 306 U. S. 451. From these cases a general principle is deduced that statutes for the regulation of business must be clear and certain enough so that businessmen can reasonably apprehend the meaning of the statutes and govern themselves thereby. A statute which causes a businessman to face too difficult a choice in order to carry on his business may be unconstitutional. Of particular import is *Cline* v. *Frank Dairy Company*, *supra*, in which the statute involved contained the usual provisions of an anti-trust statute but contained the further statement that it would not be applied where the sole purpose of the combination was to enable a businessman to make a fair profit. The Supreme Court of the United States held that this provision rendered the whole statute unconstitutional for the reason that it confronted the businessman with a severe dilemma. The statute made him guess what profit might subsequently be held to be fair. If his guess were too optimistic he might find himself in jail, and if his guess were too conservative then he might end up in the poor house. A similar case is *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, prohibiting conspiracies having a purpose of forcing sale of property at less than its value. The principle of reasonable certainty has special force as regards penal statutes. The statute here in question is highly penal, because as applied, contracts made by competent parties are altered if there is held to be a violation.

We conceive the particular vice of the statute here in question (as construed) to be a mis-use of the term "*excep-*

tion", which is a familiar word in the law of real property and insurance, by attributing thereto a meaning flagrantly at variance with its well-understood legal meaning. This term has meant historically the derogation from a grant, both in the general law and in the previous decisions of the Supreme Court of Kansas. *Barrett* v. *Kansas and Texas Coal Company*, 70 Kan. 649, 79 P. 150; *Dennett* v. *Meredith*, 168 Kan. 58, 211 P. 2d 117; *Black's Law Dictionary*, 3d Ed. In the present opinion, however, the Supreme Court of Kansas has held that a heading, or sub-title, is in effect an insuring clause or *benefit*, and that the actual text of the policy constitutes an *exception* to the headnote material. More specifically, the Supreme Court of Kansas has held that the sub-title of Part II of the policy: "CONFINING ILLNESS EIGHTY DOLLARS PER MONTH," is the *benefit* provided and that the body of the ensuing constitutive paragraph, setting out the degree of disability required, the period of payments, and the amount of indemnity per month, is merely an *exception* to the so-called "*benefit*" set out in the sub-title. Cf. *Berry* v. *Merchants Life and Casualty Co.*, 181 Wis. 487, 195 N. W. 335. It is axiomatic that the construction of a state statute by a state court becomes a part of the statute for federal constitutional purposes. *Dennis* v. *United States*, 341 U. S. 494, l.c. 501-2, contains a recent restatement of this familiar principle.

Since state statutes must be reasonably intelligible in order to satisfy the requirements of the federal constitution, it follows that if such a statute is given by the state court a meaning which could not be fairly and reasonably predicted, then the statute is constitutionally infirm. It cannot properly be held that the requirement of reasonable certainty applies only to the work of the legislature. In the last analysis, the courts must be de-

pended upon to say what statutes mean. The meaning of a statute is reasonably certain only to the extent that its construction by the courts is foreseeable. The state court of last resort has the exclusive power of saying what the state legislature meant in passing a statute. The statute and the decisions construing it have to be read as a whole. The requirement of reasonable certainty would be meaningless if it were held that a state court could do what the legislature could not do by giving an indefinite, unpredictable, and uncertain meaning to a statute.

Under the statute as thus construed, any part or parts of this policy except the titles and sub-titles may be construed as "exceptions" and thus wholly invalidated. In view of this possibility, no one could possibly know what this policy (or any other similar policy) means in the eyes of Kansas court, nor could he anticipate what may result from these (or future) holdings of that court. Under this holding, *everything* is an exception which does not appear in type of the same prominence as the largest type in the policy.

(b) *Assignment of Error No. (2).*

The effect of the decision of the Supreme Court of the State of Kansas in this case is a radical alteration of the contract which the parties made. We realize that mere error in the decision of a state court is not ground for relief in the Supreme Court of the United States. It is settled law, however, that judicial action is state action within the meaning of the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1. The Supreme Court of Kansas has arbitrarily disregarded former decisions by giving to the terms "exception" and "benefits" meanings which they never had before in the law of Kansas and in disre-

garding the effect of its decisions construing these terms. In fact, the court has construed a mere *sub-title* or *heading* (in heavy type) as the *insuring clause*, and the actual text of the paragraph granting the benefits as an "*exception*" under the statute. This is clearly a departure from the meaning of the terms as previously established by the Kansas courts (See cases cited under Point (a)). The sub-title is not, in itself, a grant of benefits at all; it is not even a complete sentence, and it specifies no duration. The body of the ensuing paragraph cannot be an "exception" to, or derogation from, a *grant* or *benefit*, for no grant has been made or benefit declared previously; the benefit is only declared in that paragraph itself. There cannot be an "exception" unless there is a positive grant.

In *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, a judgment of the Supreme Court of Missouri, which arbitrarily reversed prior decisions, was relieved against by the Supreme Court of the United States.

In *Terre Haute & Illinois Railroad Co.* v. *Indiana*, 194 U. S. 579, 261 U. S. 236, it was held that a state court had given to the charter of a corporation so unwarranted and unreasonable a construction, that a deprivation of due process of law resulted. The Supreme Court of the United States required that there be some rhyme or reason in the state court's construction of the charter.

In *Columbia Rural Gas & Electric Co.* v. *South Carolina*, 216 U. S. 236, it was held that the Supreme Court of South Carolina had proceeded unconstitutionally in construing a certain clause in a deed as a condition subsequent rather than as a covenant, so that a forfeiture of a grant was decreed.

In the present case the parties made a contract. There is no claim that the insured was deceived as to the meaning of the contract. Let us assume, as the Kansas court

has apparently assumed, that the insured is required to read only that part of the policy which is printed in ten point bold face capitals. He might read parts C and E and he would find there the express statement that certain benefits were payable for life. Could he not reasonably wonder how long benefits provided in Parts D, H, I, and J are to be payable, since there is no express statement? Would this not cause him to refer to the surrounding text?

By the decisions of the Supreme Court of Kansas the insured has been given something which he never bargained for and to which he was not entitled under the contract as written. The court has reached this result only by giving an unwarranted and unprecedented construction to the terms "exception" and "benefits" as used in the statutory provisions cited in part (1) of this statement, and has made the contract between these parties something other than it is. This is the flagrant kind of misconstruction of an instrument against which relief may be given under the doctrine of the *Terre Haute & Ill.* and *Columbia Rural Electric cases, supra.*

(c) *Assignment of Error No. (3).*

Article I, Section 10, Clause 1 of the Constitution of the United States provides:

> "No state shall * * * pass any * * * law impairing the obligation of contract."

We are fully aware of the holdings through many decades that the above quoted clause applies only to legislative action impairing the obligations of pre-existing contracts. We are also aware of the decisions holding that a court in construing a contract or in applying the laws of contract cannot be guilty of impairing the obligations of a contract.

We believe, however, that these holdings are open to re-examination in the light of the famous case of *Erie Railroad*

Company v. *Tompkins*, 304 U. S. 64. Up to the time of the *Erie* decision, the rule of *Swift* v. *Tyson*, 16 Pet. (U. E.) 1, in which Justice Story laid down the proposition that judicial decisions were not to be considered a part of the law, controlled. Justice Story stated at page 17 of his opinion:

> "* * * In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established customs having the force of laws * * *."

Following reasoning of this kind, it is easy to see how the result was reached that a state decision regarding a contract was not a law impairing the obligation of that contract even though the decision might seem inconsistent with general principles of law and with the past decisions of the court rendering it.

By the Erie Railroad opinion, however, the rule of *Swift* v. *Tyson* was definitely and positively repudiated. In that case, Justice Brandeis stated at page 78:

> "* * * except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern * * *."

The rationale of the *Erie* case is that decisions of courts are law in a very real and practical sense. Only in the decisions of courts are the abstract commands of the law translated into binding rules enforced for and against the citizenry.

Our Federal Constitution stands for the proposition that parties may contract freely within the existing law and that the law may not be changed after the contract is made. We have found no case considering the obligation of contracts clause in the light of the definition of law contained in the Erie Railroad case.

Such a re-examination ought to be made. *A party whose contract is altered by an unpredictable, unreasonable judicial decision is just as much deprived of the benefits of his contract as he would be had there been a deprivation of by state statute.*

In the prior opinion in the *Owen* case this court has proceeded in contravention of its prior decisions and has given to the term *exception* and the term *benefit* meanings not reflected in these prior decisions or generally in the law. This is very clearly and simply a changing of the obligations which this defendant assumed when it made the contract of insurance here in question.

(d) *Assignment of Error No. (4).*

This point is very important in the case because it represents a refusal of the Supreme Court of Kansas to consider our constitutional arguments. Failure of a state court to consider a federal question properly presented to it is in itself the denial of a federal right. See authorities cited under Part (2) of this statement.

The opinion of the Supreme Court of Kansas in this case contains the suggestion that the constitutional points in case No. 38365 should have been raised in the demurrer. This is not sound, however, for the reason that the Kansas statutes state that a general demurrer is sufficient, and do not list unconstitutionality as a specific ground for demurrer. General Statutes of 1949, Sec. 60-705.

It is also said that a point should have been made in the motion for rehearing after the interlocutory appeal on the

overruling of the demurrer. This is in disregard of the statement contained in numerous Kansas cases that the purpose of a motion for rehearing is the correction of errors in the original opinion, and that the motion may not be made in order to raise new points. *Western News Co. v. Wilmarth*, 34 Kan. 254, 8 Pac. 104; *Blair* v. *McQuary*, 100 Kan. 203, l. c. 206, 162 Pac. 1173; *Headley* v. *Challiss*, 15 Kan. 453, l. c. 457.

It is also suggested that an effort should have been made to take the case to the Supreme Court of the United States following the decision of the Supreme Court of Kansas on rehearing in the interlocutory appeal. At that stage of the case, there was no final judgment so as to permit the assumption of federal jurisdiction. The demurrer stood overruled, and this appellant was then entitled to (and did) file its answer. The case was not then finally disposed of by the state court. See *Gospel Army* v. *Los Angeles*, 331 U. S. 543.

The constitutional points were raised in our answer, which was the first pleading filed by appellent in the case. Evidence was sought to be introduced in support of these constitutional points. There can be no introduction of evidence on a demurrer under the law of Kansas. *American Glycerin Co. v. Freeburne*, 157 Kan. 22, 138 Pac. 2d 468. The evidence sought to be introduced is contained in the record of both appeals and that part which the trial court did not permit to be introduced is contained in the affidavits of testimony rejected at the trial, which were filed in support of motions for new trial, and are shown in the abstracts of record.

We recognize the rule that constitutional questions must be raised at the first point consistent with ordinary procedure. Where such points require evidence in support, they cannot possibly be raised on demurrer under Kansas practice. A party should be entitled to a reasonable discretion and election in deciding whether to introduce evidence in support of a constitutional point.

By its holding as contained in the present opinion, the Supreme Court of Kansas has denied this appellant a full and fair hearing of points properly raised.

(e) *Assignments of Error No. (5).*

This assignment represents an even more flagrant denial of the right to a fair hearing and decision. As is pointed out in Part (2) of this statement, two separate suits are here involved, seeking benefits for different periods under the same insurance policy. Separate causes of action are certainly presented. Under the doctrine originally enunciated in the case of *Cromwell* v. *County of Sac*, 93 U. S. 351, a point not raised in one proceeding can never operate as a collateral estoppel in a subsequent proceeding on a separate cause of action. The present cases are exactly parallel to the *Cromwell* case. In the *Cromwell* case a suit was filed to recover on certain interest coupons on a bond and the plaintiff made no effort to prove that he was a bona fide purchaser. In a subsequent suit for the principal of the identical bonds, with both parties being the same in contemplation of law, an effort was made to prove a bona fide purchase. The Supreme Court of the United States held emphatically that the failure to present the question of bona fide purchase in the former case was conclusive as to that case; but was not a determination of the point in a later case on a different cause of action. If a suit for interest on a bond is a different cause of action from a suit for the principal of the same bond, then certainly a suit for benefits for one period under an insurance policy is a different cause of action from a suit for benefits for another period.

It is apparent that the constitutional points in case No. 38366 were raised in the first pleading filed in the case by this appellant. They could not have been raised at an earlier stage. The Supreme Court of Kansas is absolutely unjus-

tified in holding that the failure to raise these points in *another hearing*, on a *different cause of action*, would bar their consideration.

(f) *Assignments of Error (6) and (7).*

These relate solely to the judgment. If the statute here in question cannot constitutionally be enforced against this appellant, then any judgment based on the authority of the statute is as a result unconstitutional.

Conclusion

This case is properly one for appeal to the Supreme Court of the United States. Substantial federal questions are presented. Constitutionality of a state statute has been drawn into question and the decision of the state court is in favor of the validity of the statute.

Respectfully submitted,

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THIS POLICY PROVIDES BENEFITS FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS, OR LOSS OF TIME BY SICKNESS AS HEREIN PROVIDED

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION

M B H&A A

Monthly Benefits **$80.00**

Maximum Monthly Benefits **$160.00**

OMAHA

(Herein called Association)

DOES HEREBY INSURE

Death Benefit **$2,000**

Maximum Death Benefit **$4,000**

INSURING CLAUSE

CLARENCE OWEN (Herein called the Insured)

of City of LINCOLN State of KANSAS

against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accident Indemnities

PART A. **SPECIFIC LOSSES**

If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks the Association will pay:

BY SICKNESS AS HEREIN PROVIDED

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION

M B H & A

OMAHA

Monthly Benefits **$80.00**

Maximum Monthly Benefits **$160.00**

Death Benefit **$2,000**

Maximum Death Benefit **$4,000**

(Herein called Association)
DOES HEREBY INSURE

INSURING CLAUSE

CLARENCE OWEN (Herein called the Insured)

of City of LINCOLN State of KANSAS

against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

Accident Indemnities

SPECIFIC LOSSES

PART A. If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For Loss of Life	$2,000.00
And in addition, $80 a month for the period between the date of accident and the date of death.	
For Loss of Both Eyes	2,000.00
For Loss of Both Hands	2,000.00
For Loss of Both Feet	$2,000.00
For Loss of One Hand and One Foot	2,000.00
For Loss of Either Hand	700.00
For Loss of Either Foot	700.00
For Loss of Either Eye	500.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

DOUBLE SPECIFIC LOSSES

PART B. If the Insured sustains injuries as described in the Insuring Clause, while riding as a passenger, within the enclosed part of any railway or street railway passenger car, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, and such injuries independently and exclusively of disease and all other causes shall continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks from the date of the accident, the Association will pay:

For Loss of Life	$4,000.00
And in addition, $160 a month for the period between the date of accident and the date of death.	
For Loss of Both Eyes	4,000.00
For Loss of Both Hands	4,000.00
For Loss of Both Feet	$4,000.00
For Loss of One Hand and One Foot	4,000.00
For Loss of Either Hand	1,400.00
For Loss of Either Foot	1,400.00
For Loss of Either Eye	1,000.00

Loss in every case referred to in the above schedule for dismemberment of hands and feet shall mean severance at or above the wrist or above the ankle joint, respectively, and the loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Only one of the amounts named in this part will be paid for injuries resulting from one accident and shall be in lieu of all other indemnity.

PART C. TOTAL ACCIDENT DISABILITY EIGHTY DOLLARS PER MONTH FOR LIFE

If such injuries as described in the Insuring Clause, shall wholly and continuously disable the Insured for one day or more, and so long as the Insured lives and suffers said total loss of time, the Association will pay a monthly indemnity at the rate of Eighty ($80.00) Dollars.

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PART D. **PARTIAL ACCIDENT DISABILITY THIRTY DOLLARS PER MONTH**

If such injuries, as described in the Insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, the Association will pay for the period of such partial loss of time, but not exceeding three consecutive months, a monthly indemnity of Thirty ($30.00) Dollars.

PART E. **DOUBLE INDEMNITY ONE HUNDRED SIXTY DOLLARS PER MONTH FOR LIFE**

If the Insured sustains injuries while riding as a passenger, within the enclosed part of any railway or street railway passenger car, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, the Association will pay double the amount of monthly indemnity the Insured would otherwise receive.

PART F. **MEDICAL ATTENDANCE TWENTY DOLLARS**

If such injuries require immediate medical or surgical treatment by a physician, surgeon or osteopath, and Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, not exceeding Twenty ($20.00) Dollars.

PART G. **FINANCIAL AID TWO HUNDRED DOLLARS**

If the Insured physically unable to communicate with friends, the Association will, upon receipt of a telegram, immediately transmit to the relatives or friends of the Insured any information respecting the accident necessary to put the Insured in communication with, and in the care of friends, provided such relatives or friends shall forward the sum of Two Hundred ($200.00) Dollars. This benefit to be in addition to any other benefits.

Illness Indemnities

PART H. **CONFINING ILLNESS EIGHTY DOLLARS PER MONTH**

The Association will pay, for one day or more, at the rate of Eighty ($80.00) Dollars per month, not exceeding twelve months, for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

PART I. **NON-CONFINING ILLNESS FORTY DOLLARS PER MONTH**

The Association will pay, for one day or more, at the rate of Forty ($40.00) Dollars per month, not exceeding one month, for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

PART J. **ONE HUNDRED TWENTY-FIVE DOLLARS PER MONTH WHILE IN HOSPITAL**

If the insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expense, but not exceeding Forty-five ($45.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

ART K. **RETURN OF PREMIUMS**

In event of the accidental death of the Insured under the provisions of this policy, providing this policy has been in force for one year, the Company agrees to pay in addition to the amount otherwise payable, an amount equal to all the premiums paid by the Insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the Insured.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No provision shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or any authorized agent of the Association, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary

[redacted] the Insured sustains injuries while riding as a passenger, within the enclosed part of any railway or street railway passenger car, provided by a common carrier for passenger service only, propelled by steam or electricity, caused by the wrecking of the conveyance, the Association will pay double the amount of monthly indemnity the Insured would otherwise receive.

PART F. MEDICAL ATTENDANCE TWENTY DOLLARS

If such injuries require immediate medical or surgical treatment by a physician, surgeon or osteopath, and Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, not exceeding Twenty ($20.00) Dollars.

PART [redacted] FINANCIAL AID TWO HUNDRED DOLLARS

[redacted] the Insured physically unable to communicate with friends, the Association will, upon receipt of a [redacted] number, immediately transmit to the relatives or friends of the Insured any information respecting [redacted] ces necessary to put the Insured in communication with, and in the care of friends, provided such [redacted] sum of Two Hundred ($200.00) Dollars. This benefit to be in addition to any other benefits.

Illness Indemnities

PART H. CONFINING ILLNESS EIGHTY DOLLARS PER MONTH

The Association will pay, for one day or more, at the rate of Eighty ($80.00) Dollars per month, not exceeding twelve months, for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time.

PART I. NON-CONFINING ILLNESS FORTY DOLLARS PER MONTH

The Association will pay, for one day or more, at the rate of Forty ($40.00) Dollars per month, not exceeding one month, for disability resulting from disease, the cause of which originates more than thirty days after the date of this policy, and which does not confine the Insured continuously within doors but requires regular medical attention; provided said disease necessitates total disability and total loss of time.

PART J. ONE HUNDRED TWENTY-FIVE DOLLARS PER MONTH WHILE IN HOSPITAL

If the insured on account of any accidental injury or disease covered by this policy shall enter a hospital and be necessarily and continuously confined therein solely on account of said injury or disease, the Association will reimburse him for his actual hospital expense, but not exceeding Forty-five ($45.00) Dollars per month or a proportionate amount for any fractional part of a month. This benefit is in addition to any other monthly benefits and shall be payable for a period not exceeding three months.

ART K. RETURN OF PREMIUMS

In event of the accidental death of the Insured under the provisions of this policy, providing this policy has been in force for one year, the Company agrees to pay in addition to the amount otherwise payable, an amount equal to all the premiums paid by the Insured on this policy, plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the date of death of the Insured.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No [redacted] tion shall be made in any indemnity herein provided by reason of change in the occupation of the Insured or by reason of [redacted] ing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid, unless approved by an executive officer of the Association and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death immediate notice thereof must be given to the Association.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Association is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the Association, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

[redacted] the words "two years" [redacted] pers. It is hereby [redacted] to "five years [redacted] to comply with the [redacted]

4838

125-B

NON-CANCELLABLE ENDORSEMENT

The Association cannot cancel this policy during any period for which the premium has been paid.

It is further understood and agreed that this policy cannot be cancelled by the Association during any period of disability of the Insured.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this endorsement to be signed by its President and its Treasurer.

Treasurer

President.

S 1129

to the Association. Failure

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9. Has any application ever made by you for life, accident or health insurance been declined? Answer as to each no

Has any life, health or accident policy issued to you been cancelled? - Answer as to each no

Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each no If so, give full particulars no

10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes no

11. Are you sound physically and mentally? Answer as to each yes Are you maimed or deformed? Answer as to each no

Have you any impairment of sight or hearing? Answer as to each no Have you ever had a hernia? no

Are your habits correct and temperate? yes

12. Have you ever had any of the following diseases: Rheumatism? no Tuberculosis? no Epilepsy? no

Diabetes? no Heart Disease? no Any disease of the brain or nervous system? no

13. Have you received medical or surgical advice or treatment or had any local or constitutional disease within the past five years? Answer as to each no

In (Year) for (Nature of Disease) lasting (State Duration)

In for lasting

14. Have you ever been operated on by a physician or surgeon? no Date

For Result

15. Do your average monthly earnings equal or exceed the monthly indemnity payable under the policy now applied for and under all other accident and health policies now carried by you? yes

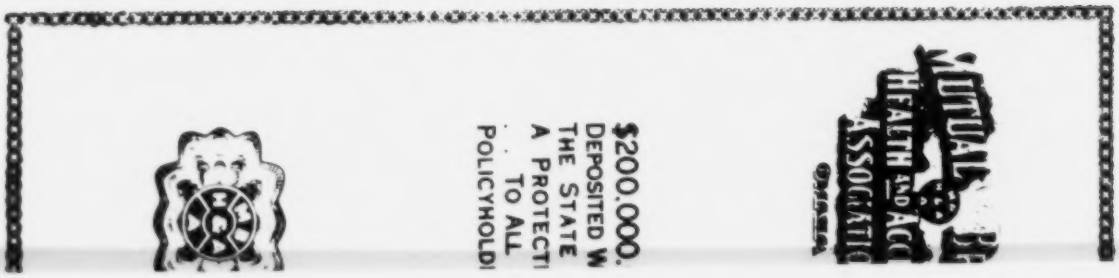
16. What is the form number of policy applied for? 40 What is the premium? $ 10.00 Quarterly

17. Do you agree that this application shall not be binding upon the Association until accepted by the Association, nor until the policy is accepted by the Insured while in good health and free from injury? yes

18. Do you hereby apply to the MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right to recover if such false statement is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association, and do you agree to notify the Association promptly of any change in your occupation, or if you take additional insurance? yes

Dated at Lincoln this 8 day of June 19 27

(Signature of applicant) Clarence Owen



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In for lasting

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For Result

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Dated at Lincoln this 8 day of June 19 27

(Signature of applicant) Clarence Owen

THIS POLICY PROVIDES BENEFITS FOR LOSS OF LIFE, LIMB, SIGHT OR TIME BY ACCIDENTAL MEANS, OR LOSS OF TIME BY SICKNESS AS HEREIN PROVIDED

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION OMAHA

ISSUED TO

CLARENCE OWEN

DATED

JUNE 21, 1927

Policy Form 40

No 411-1(1)(A)(1)

IN THE

$200,000.00 DEPOSITED WITH THE STATE AS A PROTECTION TO ALL POLICYHOLDERS

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION OMAHA

125-C

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Additional Provisions

(a) This policy does not cover death, disability, or other loss sustained in any part of the world except the United States and Canada, or while engaged in military or naval service, or while the Insured is not continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of or while participating in aeronautics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the Insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the Insured, is a condition precedent to recovery, and any failure in this respect shall forfeit to the Association all right to any indemnity.

(c) The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of Twelve ($12.50) Dollars and Fifty Cents as first payment; and the payment in advance of Ten ($10.00) Dollars quarterly thereafter, beginning with Oct. 1st, 1927, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. The mailing of notice to the Insured at least fifteen days prior to the date they are due shall constitute legal notice of dues.

The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

(d) The term of this policy begins at 12 o'clock noon, Standard Time, on date of issue against accident and on the thirty-first day after date of issue against disease and ends at 12 o'clock noon on date any renewal is due.

(e) No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(f) The Annual Meeting of the Association will be held at ten o'clock A. M. on the second Saturday after the first day of February, at the Home Office of the Association.

IN WITNESS WHEREOF, MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION has caused this policy to be signed by its President and its Treasurer, and dated this 21 day of June 19 27, but the same shall not be binding upon the Association until countersigned by its duly authorized Policy Clerk.

Treasurer.

President.

Countersigned by E C Bales
Policy Clerk.

COPY OF APPLICATION

1. What is your full name? Clarence Owen

2. What is your age? 49 Date of birth? Febr. 2--, 1878

Place of birth? Lebanon, New York (State)

Height? 5 feet 9 inches. Weight? 180 Pounds

3. What is your residence address? Street

Town of Lincoln State of Kansas

Address to which premium notices are to be sent

4. Whom do you name as beneficiary? Name My Estate
Address

What is the relationship of the beneficiary to you?

5. Are you member of firm or employee? Propr. of own business Name of firm? Clarence Owen

Nature of business? Livery Dray and Transfer

Location of firm? Street

Town of Lincoln State of Kansas

6. What is your occupation? Livery Dray and Transfer

7. What are all of your duties connected therewith? General duties of business

8. What accident or health insurance do you carry? Give names of all companies or associations and amounts no

(a) This policy does not cover death, disability, or other loss sustained in any part of the world except the United States and Canada, or while engaged in military or naval service, or while the Insured is not continuously under the professional care and regular attendance, at least once a week, beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of or while participating in aeronautics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the Insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the Insured, is a condition precedent to recovery, and any failure in this respect shall forfeit to the Association all right to any indemnity.

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The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required.

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Treasurer.

President.

Countersigned by C. C. Bales
Policy Clerk.

COPY OF APPLICATION

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2. What is your age? 49 Date of birth? Febr. 2nd, 1878

Place of birth? Lebanon, New York (State)

Height? 5 feet 9 inches. Weight? 180 Pounds

3. What is your residence address? Street

Town of Lincoln State of Kansas

Address to which premium notices are to be sent

4. Whom do you name as beneficiary? Name My Estate
Address

What is the relationship of the beneficiary to you?

5. Are you member of firm or employee? Propr. of own business Name of firm? Clarence Owen

Nature of business? Livery Dray and Transfer

Location of firm? Street

Town of Lincoln State of Kansas

6. What is your occupation? Livery Dray and Transfer

7. What are all of your duties connected therewith? General duties of business

8. What accident or health insurance do you carry? Give names of all companies or associations and amounts no

Have you any application for life, accident or health insurance pending? Answer as to each no

125-D

APPENDIX A

No. 37289

CLARENCE OWEN, *Appellee*,

v.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, *Appellant*

SYLLABUS BY THE COURT

A health benefit insurance policy is examined and it is held to violate G. S. 1935, 40-1109 (a) by printing a limitation upon benefits in smaller type than the provision providing for such benefits. *Further held*, that under subsection (i) the policy is not void, but should be construed as though the limiting clause were not in the policy at all.

Appeal from Lincoln District Court; A. R. Buzick, judge. Opinion filed March 5, 1949. Affirmed.

LaRue Royce, of Salina argued the cause, and *B. I. Litowich, E. S. Hampton, H. H. Dunham, Jr., John Q. Royce*, and *H. G. Engleman*, all of Salina, were with him on the briefs for the appellant.

Jerry E. Driscoll, of Russell, argued the cause, and *John J. McCurdy*, of Lincoln, was with him on the briefs for the appellee.

The opinion of the court was delivered by

HARVEY, C. J.: This was an action on an insurance policy. The defendant's demurrer to the amended petition was overruled and it has appealed.

The record discloses that defendant, a Nebraska corporation authorized to do business in Kansas, on June 21, 1927, issued the policy here in question. So far as here pertinent the policy reads:

> "Mutual Benefit Health and Accident Association, Omaha . . . Does hereby insure [Insuring Clause] Clarence Owen . . . of City of Lincoln, State of Kansas, . . . against loss of time on account of disease contracted during the term of this Policy, . . .

subject, however, to all the provisions and limitations hereinafter contained."

This is followed by what is denominated Parts A to G., which pertain to accident indemnities, with which we are not concerned. This is followed by a heading "Illness Indemnities," printed in 18-point Caslon, a heavy face type, followed on the next line by "Part II. Confining Illness Eighty Dollars per Month," printed in 10-point capital letters, a heavy face type. This is followed by a paragraph in 10-point light face type which reads:

> "The Association will pay, for one day or more, at the rate of Eighty ($80.00) Dollars per month, *not exceeding twelve months*, (our emphasis) for disability resulting from disease, the cause of which originates more than thirty days after the date of this Policy and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time."

Pasted to the policy is an endorsement, duly executed by the president and treasurer of the Association, which reads:

"NON-CANCELLABLE ENDORSEMENT

> "The Association cannot cancel this policy during any period for which the premium has been paid.
>
> "It is further understood and agreed that this policy cannot be cancelled by the Association during any period of disability of the Insured."

The petition alleged that the insured paid the premium of $12.50 at the time the policy was issued and at $10 per quarter as the same became due, which the Association accepted until July 8, 1941, after which the Association refused to accept the payments, although they were duly tendered. It further alleged that on July 8, 1940, while the contract was in full force and effect, plaintiff, then residing and being in Lincoln, Kansas, as the result of a cerebral hemorrhage, became and was confined to his home; that the

illness and confinement has been continuous from July 8, 1940, to the date of the filing of the petition in this action, June 22, 1946; that the illness confines plaintiff continuously within doors and requires regular visits from a qualified physician, and by reason thereof the plaintiff, since July 8, 1940, has been and is now totally disabled to perform any work or labor, and such total disability and confinement will continue during the remainder of his life; that defendant has paid the plaintiff the sum of $960, at the rate of $80 per month, and that the last payment was made on July 8, 1941; that it has failed to pay anything since that date, and that there is now due and owing plaintiff from defendant the sum of $4,920. The prayer was for that sum plus a reasonable attorney's fee.

The question for decision here is what effect, if any, should be given to the clause "not exceeding twelve months" which we emphasized above in setting out Part II. of the policy, in view of our statute (G. S. 1935, 40-1109), which was in force at the time the policy sued upon in this action was issued, the pertinent parts of which read:

> "(a) No stock or mutual insurance company or association . . . shall issue or deliver any policy of insurance against loss or damage for the sickness . . . of the insured . . . to any person in this state, . . . (6) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply: . . . (i) A policy issued in violation of this section shall be held valid but shall be construed as provided in this section, and when any provision in such a policy is in conflict with any provision of this section the rights, duties and obligations of the insurer, the policyholder and the beneficiary shall be governed by the provisions of this section."

In *Stewart v. Mutual Benefit Health & Acc. Ass'n*, 135 Kan. 138, 9 P. 2d 977, where a similar question was presented, the court referred to these statutes and,

> "*Held*, that where a policy did not comply with this statute is should be construed as though the restricting clause were not in the policy at all."

This decision was followed in *Noel v. Continental Casualty Co.*, 138 Kan. 136, 141, 23 P. 2d 610, where a similar question was presented. We think the statute and the decisions are applicable here. In this case the words "Illness Indemnities" and "Confining Illness Eighty Dollars per Month," contained no limitation as to time of benefit payments. The only place that is found is in the 10-point light-face type. This limitation is an exception, as that word is used in our statute, under our decision last cited.

Counsel for appellant cite *Hildebrand v. Washington National Ins. Co.*, 155 Kan. 220,124 P. 2d 510. An examination of the case discloses it is not in point. There the insuring clause made a classification of risks all in the same sized type. The phrase here in question is not a classification of risks, but is clearly a limitation upon the amount of payment for a risk clearly assumed.

Counsel for appellant make a point of the fact that in plaintiff's petition our statute above referred to was not mentioned. We think that was not necessary. The court takes judicial notice of its own statutes. It was only necessary for the petition to state the facts constituting its cause of action. (G. S. 1935, 60-704, *Second.*)

Counsel for appellant properly contend that when an action is predicated upon a written instrument, a copy of which is attached to the petition, the court should be controlled by the language of the instrument rather than by allegations in the petition which might properly be regarded as conclusions of the pleader. In this case we have examined the instrument, the original of which has been furnished us for that purpose. Among other things we notice that the time within which an action must be brought in the policy was printed as two years. This was changed to five years "to comply with the laws of Kansas." Perhaps a similar purpose prompted defendant in attaching to the policy the noncancelable endorsement above quoted, in which it was agreed "that this policy cannot be canceled by the Association during any period of disability of the Insured," and that the same was designed to make meaningless the phrase in the policy "not exceeding twelve months," hereinbefore discussed. But since this point was not argued by counsel we shall not discuss it further.

We find no error in the record. The judgment of the court below is affirmed.

Arn, J., not participating.

APPENDIX B

No. 37,289

Clarence Owen, *Appellee*,

v.

Mutual Benefit Health and Accident Association, *Appellant*

Opinion on Rehearing

Appeal from Lincoln district court; A. R. Buzick, judge. Opinion on rehearing filed October 8, 1949. Former opinion adhered to. (For original opinion, see 166 Kan. 525, 203 P. 2d 196.)

LaRue Royce, of Salina, argued the cause, and B. I. Litowich, E. S. Hampton, H. H. Dunham, Jr., John Q. Royce, and H. G. Engleman, all of Salina, were with him on the briefs for the appellant.

Jerry E. Driscoll, of Russell, argued the cause, and John J. McCurdy, of Lincoln, was with him on the briefs for the appellee.

George Siefkin and John F. Eberhardt, both of Wichita, filed brief *amici curiae*.

The opinion of the court was delivered by

Harvey, C. J.: Following our former opinion, counsel for appellant filed a motion for rehearing, which was granted, and the case was set for our July session. It was reargued by counsel, who filed additional briefs, and a brief was filed *amici curiae*. The court has reconsidered the questions originally argued and those argued on the rehearing, and has also considered the briefs, and finds no reason to disturb its former decision.

The court adheres to the order of affirmance.

APPENDIX C

No. 38,365

CLARENCE OWEN, *Appellee*,

v.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, *Appellant*

No. 38,366

CLARENCE OWEN, *Appellee*,

v.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, *Appellant*

SYLLABUS BY THE COURT

1. It is the general rule that when a litigant desires to question the constitutionality of the statute involved in a case he should do so at the earliest opportunity or it will be considered as waived.

2. A litigant who desires to question the federal constitutionality of a decision of this court must do so by appeal or certiorari to the Supreme Court of the United States.

3. When a matter is once adjudicated by the final decision of this court and not appealed from it is conclusively determined between the same parties and their privies as to all matters which were or might have been litigated in the case, and this determination is binding as an estoppel in all other actions between them, whether commenced before or after the adjudication.

Appeal from Lincoln district court; A. R. Buzick, judge. Opinion filed July 3, 1951. Affirmed.

Charles B. Blackmar, of Kansas City, Missouri, argued the cause, and *La Rue Royce*, of Salina, and *Henry I. Eager*, of Kansas City, Missouri, were with him on the briefs for the appellant.

Jerry E. Driscoll, of Russell, argued the cause, and *John J. McCurdy*, of Lincoln, was with him on the briefs for the appellee.

The opinion of the court was delivered by

HARVEY, *C. J.*:

In each of these cases the plaintiff sought to recover benefits alleged to be due him on a health and accident insurance policy issued by defendant. They differ only as to the period of time for which recovery was sought. In case No. 38,365 plaintiff sought to recover benefits for the period from July 8, 1940 to June 22, 1946. The case was here before on a demurrer to the petition (166 Kan. 525, 203 P. 2d 196; 168 Kan. 10, 210 P. 2d 232), where the court affirmed the order of the trial court overruling defendant's demurrer to the petition. In case No. 38,366 plaintiff seeks to recover benefits under the same policy involved in the prior suit for the period from June 22, 1946 to January 8, 1950. In the trial court all facts were stipulated which would entitle plaintiff to recover in each case if the contract of insurance provided for payments for the period for which recovery is sought. The trial was by the court, a jury trial having been waived. The court found for plaintiff in each case and rendered judgment accordingly. They were tried at the same time, but were not consolidated, and separate abstracts have been filed in this court. The cases were consolidated for hearing in this court and counsel for each party have filed but one brief covering both cases. Defendant, as appellant here, presents two questions for our determination:

> "1. As to both appeals, whether G. S. 1935, Section 40-1109 (a) (6) and (i) as construed by this court in the opinions reported at 166 Kans. 525 and 168 Kans. 10, violates the Constitution of the United States by depriving defendant of property without due process of law and impairing the obligation of contracts.
>
> "2. As to appeal No. 3866, whether the decisions reported at 166 Kans. 525 and 168 Kans. 10 are erroneous and ought to be overruled."

As to the first question presented, the trial court found that it was without merit, and also found that the question was not timely raised, particularly with reference to the first case. With respect to that the record discloses that the first case (our present No. 38,365) was filed in the district court on June 24, 1946; that defendant first filed a motion to make the petition definite and certain by attaching thereto a copy of the policy of insurance, and an amended petition was filed in which that was done. Defendant demurred to the amended petition upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was considered by the trial court and overruled, and defendant appealed to this court. An opinion of this court affirming the judgment of the trial court was filed on March 5, 1949, and reported in 166 Kan. 525, 203 P. 2d 196. The appellant filed a motion for rehearing, which was granted and the case set for our July, 1949 session. The case was reargued by counsel, who filed additional briefs, and a brief on appellant's behalf was filed amici curiae. The court reexamined the questions originally argued and those argued on rehearing, and in an opinion handed down on October 9, 1949, adhered to its former opinion (168 Kan. 10, 210 P. 2d 232). No further motion for rehearing was filed by the appellant and our mandate went down on October 31, 1949. At no time or place in the consideration of that case did the defendant ever contend or suggest that the statute (G. S. 1935, 40-1109 (a) (6) (i)) violated the federal constitution, nor did it contend that our opinion filed on March 5, 1949, either alone or in connection with the statute, violated the federal constitution.

The invalidity of the statute could have been raised by the demurrer filed (see cases cited in the annotation 71 A. L. R. 1194) and perhaps the wording of the demurrer was broad enough to raise the question but it was contended either in the trial court or in this court that the demurrer should be sustained upon that ground.

If counsel for defendant considered the statute constitutional, if standing alone, but that it had been rendered unconstitutional by our decisions handed down on March 5,

1949, that question was not raised by the motion for rehearing; neither was it suggested in the briefs or arguments upon the rehearing, and of course was not raised by a motion for rehearing after our decision handed down on October 9, 1949, for appellant filed no such motion for rehearing. No effort was made to take the case to the Supreme Court of the United States by appeal or by certiorari.

In this situation the authorities appear to support appellee's contention that appellant waived the constitutional question now presented. In 16 C. J. S. 225 the rule is thus stated:

> "While in considering a question affecting the constitutionality of an act it is the court's duty to exercise some discretion in determining the time when it shall be presented, it is the general rule, subject apparently to some qualifications, that such question must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived, and even ignorance of pertinent facts is not an excuse for failure to assert constitutional rights at the proper time. Accordingly, a constitutional objection not raised by the pleadings ordinarily may not be raised later at trial. . . . In some jurisdictions, the constitutionality of a particular statute upon which a pleading is based may be raised by general demurrer thereto."

Citing, among other cases, Railroad Co. v. Abilene, 78 Kan. 820, 98 Pac. 224, where it was held:

> "The unconstitutionality of a statute or of proceedings under a statute need not be pleaded with any greater definiteness or certainty than other issues, . . ."

And on page 823 it was said: "A general demurrer will raise the question." The point being, however, the question must be raised; it cannot be simply ignored.

A similar statement of the rule is found in 12 C. J. 785 and 11 Am. Jur. 772. Each of these general authorities cites a number of federal and state decisions. And in *Yakus* v.

United States, 321 U. S. 414, 64 S. Ct. 660, 88 Law Ed. 834, the court had occasion to say (page 444):

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (Citing authorities.)

In this case we feel compelled to hold that appellant, by not raising the federal constitutional question in this case until after our decisions in 166 Kan. 525 and 168 Kan. 10 waived the right to present them. Further, we are convinced that if appellant thought our decisions above mentioned violated its rights under the federal constitution appellant should have taken steps by appeal or certiorari to have our decisions reviewed by the Supreme Court of the United States; and, not doing so, it is not in a position now to contend that the order violated the federal constitution.

More than that, we find no constitutional infirmity in the statute, as we think the following cases disclose:

Thorne v. *Aetna Life Ins. Co.* (1923), 155 Minn. 271, 275-277, 193 N. W. 463;

Williams v. *Travelers Ins. Co.* (1913), 168 Wis. 456, 462, 169 N. W. 609, 611, 959.

Tracey v. *Insurance Company* (1920), 119 Me. 131, 139, 140, 109 A. 490.

Van Dusen v. *Business Men's Association* (1927), 237 Mich. 294, 297, 211 N. W. 991.

Counsel for appellant in their brief talk about "the law of the case" and in effect concede that our decisions in 166 Kan. 525 and 168 Kan. 10 are the law of the case in the present appeal No. 38,365, but contend it is not the law of the case in No. 38,366. Whether our decisions are spoken of as "the law of the cases" or as *res judicata*, or if given their real name, the final decision of this court, unappealed from, construing the insurance policy in question as interpreted by our statute, is not very material. Certainly the trial court and the parties to the action were bound by our decisions in the further trial of the case now numbered

38,365, and since the same policy of insurance and the same statute were involved in the case No. 38,366, and the same parties were litigants, our decisions are applicable to the later case.

In the *City of Council Grove* v. *Kansas Electric Power Co.*, 137 Kan. 109, 19 P. 2d 460, at page 113, the court quoted with approval from *C. K. and W. Rld. Co.* v. *Comm'rs of Anderson Co.*, 47 Kan. 766, 29 Pac. 96, the following, which we deem applicable:

> "When a matter is once adjudicated, it is conclusively determined between the same parties and their privies as to all matters which were or might have been litigated; and this determination is binding, as an estoppel, in all other actions, whether commenced before or after the action in which the adjudication was made."

The second point presented by appellant for our determination applies only to case No. 38,366 and is whether the decisions reported in 166 Kan. 525 and 168 Kan. 10 are erroneous and ought to be overruled. Counsel for appellant in their brief ask us to reexamine those decisions and overrule them. We have reexamined them and find no reason to overrule them. We also reexamined the questions in the recent case of *See* v. *United Ins. Co.*, 171 Kan. 146, 230 P. 2d 1008.

The result is that the judgment of the trial court should be affirmed in each of the cases. It is so ordered.

APPENDIX D

IN THE SUPREME COURT OF THE UNITED STATES

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a Corporation, *Appellant*,

vs.

CLARENCE OWEN, *Appellee*

ASSIGNMENT OF ERRORS

(1) The Supreme Court of the State of Kansas erred in not holding that Section 40-1109(a)(6) and (i) of the General Statutes of 1935 of the State of Kansas is so indefinite and uncertain that enforcement thereof deprives persons in the position of this appellant of property without due process of law, in violation of Article XIV of the Amendments to the Constitution of the United States.

(2) The Supreme Court of the State of Kansas erred in not holding that its opinion reprinted in Volume 166 of the Kansas Reports at page 525 was arbitrary and unreasonable so as to deprive the defendant of property without due process of law in violation of Article XIV of the Amendments to the Constitution of the United States.

(3) The Supreme Court of the State of Kansas erred in not holding that the effect of its decision and opinion reported in Volume 166 of the Kansas Reports at page 525 was such as to constitute the passage of a law impairing the obligations of contract in violation of Article I, Section 10, paragraph (1) of the Constitution of the United States.

(4) The Supreme Court of the State of Kansas erred in holding that the points arising under the Constitution of the United States in case No. 38365 therein, were not cognizable by said Court, and in refusing to consider such points on the merits.

(5) The Supreme Court of the State of Kansas erred in holding that the points arising under the Constitution of the United States in case No. 38366 were not cognizable

therein, and in refusing to consider said points on the merits.

(6) The Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Lincoln County, Kansas in favor of appellee and against this appellant in case No. 38365.

(7) The Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Lincoln County, Kansas in favor of appellee and against this appellant in case No. 38366.

Wherefore, appellant prays reversal of the judgment of the Supreme Court of Kansas herein.

Henry I. Eager,
La Rue Royce,
E. S. Hampton,
Charles B. Blackmar,
Attorneys for Appellant.